ORIGINAL

No. 94-7448

Supreme Court, U.S.
FILED
MAR 7 1995
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RECEIVED
HAND DELIVERED
MAR - 7 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ROLAND J. BAILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

ROY T. ENGLERT, JR.
Counsel of Record
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Petitioner

TABLE OF AUTHORITIES

Cases — Pages

Langston v. *United States*,
113 S. Ct. 361 (1992) 5, 6

Smith v. *United States*,
113 S. Ct. 2050 (1993) 8

United States v. *Clemis*,
11 F.3d 597 (6th Cir. 1993), cert. denied,
114 S. Ct. 1858 (1994) 4, 5

United States v. *Feliz-Cordero*,
859 F.2d 250 (2d Cir. 1988) 1, 2, 4, 5

United States v. *Fermin*,
32 F.3d 674 (2d Cir. 1994), cert. denied,
63 U.S.L.W. 3627 (Feb. 21, 1995) 3

United States v. *Johnson*, No. 93-3149,
1995 WL 43787 (D.C. Cir. Feb. 7, 1995) 2

United States v. *Jones*, No. 93-4240,
1995 WL 82685 (10th Cir. Feb. 27, 1995) 4

United States v. *Lasanta*,
978 F.2d 1300 (2d Cir. 1992) 3

United States v. *Lindsey*, No. 90-3173,
1995 WL 56693 (D.C. Cir. Feb. 14, 1995) 2

United States v. *Matthews*,
942 F.2d 779 (10th Cir. 1991) 4

United States v. *McFadden*,
13 F.3d 463 (1st Cir. 1994) 9

United States v. *Melendez*, No. 93-1087,
1995 WL 29818 (2d Cir. Jan. 26, 1995) 1, 2, 3, 6

Statute

18 U.S.C. § 924(c) . . . . . *passim*

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-7448

ROLAND J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

The Solicitor General labors both to deny the existence of a conflict in the circuits and to defend on the merits the decision of the court of appeals. He does not succeed in either effort.

1. If Roland J. Bailey's arrest had occurred in New York City instead of Washington, D.C., his conviction under 18 U.S.C. § 924(c)(1) would have been reversed. The only significant facts supporting Bailey's conviction were that he possessed a gun, cash, and drugs simultaneously, and the gun -- though relatively inaccessible in the locked trunk of a moving car -- "was found in the same place as the cash (namely, the trunk) and in the same car as the drugs." Pet. App. 12a. In a line of cases beginning with *United States* v. *Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988), and continuing at least through *United States* v. *Melendez*, No. 93-1087, 1995 WL 29818 (2d Cir. Jan. 26, 1995), the Second Circuit has reversed Section 924(c) convictions in cases that were far better candidates than Bailey's for inferring use of a firearm during and in relation to a drug offense.[1] Conversely, the conviction in each of those cases would have had to be upheld if the Second Circuit followed the wooden, two-factor approach that a 5-4 majority of the en banc D.C. Circuit adopted in the opinion below, and that the D.C. Circuit has since applied in a mechanical fashion to uphold Section 924(c) convictions.[2] To resolve these and the other circuit conflicts identified in the petition, the Court should grant certiorari.

The Solicitor General nevertheless argues that "[t]he results in different circuits are not in conflict, and any perceived inconsistency in the approach to this issue has abated, due, in part, to

---

[1] In *Feliz-Cordero*, the police electronically recorded a conversation in a particular apartment in which the defendants discussed their trafficking in "crack" and the gun that one of them kept. On executing a search warrant for that apartment, the police discovered a .38-caliber Smith & Wesson revolved loaded with five rounds of ammunition in a dresser drawer, and cocaine, drug records, $11,000 in cash, and a beeper elsewhere in the room. 859 F.2d at 252. The Second Circuit held that "[t]his is not sufficient evidence to sustain a conviction, even in light of our recognition of the frequent connection between firearms and narcotics trafficking." *Id.* at 254. In *Melendez*, a divided court reversed a conviction for the defendant's alleged use of a machine gun, despite proof that the defendant was a key player in a massive heroin distribution ring (1995 WL 29818 at *2), proof that he participated in shootings and armed searches (*id.* at *3), and the majority's recognition that "[i]t would be naive to think defendant possessed such a lethal weapon for some innocent purpose" (*id.* at *1).

[2] See, *e.g.*, *United States* v. *Lindsey*, No. 90-3173, 1995 WL 56693 at *4 (D.C. Cir. Feb. 14, 1995) (presence of drugs and guns in apartment meets *Bailey* "proximity" and "accessibility" tests); *United States* v. *Johnson*, No. 93-3149, 1995 WL 43787 (D.C. Cir. Feb. 7, 1995).

the decision of the court below." Br. in Opp. 11. That assertion is wrong.

The clearest of the several conflicts is between the decision below and many decisions of the Second Circuit. Taking language from *United States* v. *Melendez*, *supra*, out of context, however, the government tries to show that the Second Circuit's reversal in that case was consistent with the D.C. Circuit's test. Br. in Opp. 14 n.3 But the Second Circuit's holding that the machine gun in *Melendez* was not "easily accessible" (1995 WL 29818 at *5) shows that there is a world of difference between the Second Circuit's approach and the D.C. Circuit's. The proof in *Melendez* showed that the gun was in *the same apartment* as drugs and drug records when the police arrived to arrest the defendant *in that apartment*. There was also direct proof that a co-conspirator had given the gun to the defendant. *Id.* at *3. The D.C. Circuit under its proximity-and-accessibility test would certainly affirm a conviction on these facts. But the Second Circuit found it dispositive that the proof showed drug transactions elsewhere, not in the apartment. *Id.* at *5.[3] In Bailey's case, of course, no specific drug transaction was proved *anywhere*. Thus, the Second Circuit would have reversed Bailey's conviction. See also *United States* v. *Lasanta*, 978 F.2d 1300, 1308-1309 (2d Cir. 1992).

---

[3]By contrast, in *United States* v. *Fermin*, 32 F.3d 674, 678 (2d Cir. 1994), cert. denied, 63 U.S.L.W. 3627 (Feb. 21, 1995), "[a]mple evidence demonstrated that [the defendant] engaged in numerous narcotics transactions from the office where the gun was found."

Similarly, the decision below cannot be squared with *United States* v. *Feliz-Cordero*, *supra*, despite the Solicitor General's effort (Br. in Opp. 14) to seize on the language "quickly accessible" in the Second Circuit's opinion. The Second Circuit in *Feliz-Cordero* refused to do exactly what the D.C. Circuit majority agreed to do in the decision below: "presume[]" from the bare location of a firearm that it bore the necessary relation to a narcotics crime. 859 F.2d at 254. The Second Circuit demanded either "[p]roof of a transaction" or "circumstances surrounding the presence of a firearm *in a place where drug transactions take place* suggest[ing] that it was strategically located." *Ibid.* (emphasis added). Neither factor was proved in Bailey's case.[4]

The government also is unsuccessful in its effort to distinguish conflicting decisions of other circuits. For example, the government tries to distinguish *United States* v. *Clemis*, 11 F.3d 597, 602 (6th Cir. 1993), cert. denied, 114 S. Ct. 1858 (1994), on the ground that "a firearm was discovered at a location where there had been no evidence of drug trafficking for several months and no

---

[4]Among the other courts of appeals, the Tenth Circuit probably aligns most closely with the Second. In *United States* v. *Matthews*, 942 F.2d 779, 783 (10th Cir. 1991), the court expressly endorsed the Second Circuit's *Feliz-Cordero* decision and noted that "section 924(c) requires more than mere access to a firearm." The Solicitor General tries to distinguish *Matthews* on the ground that "there was no evidence that the defendant * * * knew of the presence of weapons or handled them." Br. in Opp. 13 n.2. The Solicitor General is incorrect. The firearms were "in plain view" and "readily accessible" to the defendant. 942 F.2d at 783. The defendant's conviction would certainly have been upheld under the D.C. Circuit's test. For a more recent Tenth Circuit decision reversing a Section 924(c) conviction that the D.C. Circuit would likely have upheld, see *United States* v. *Jones*, No. 93-4240, 1995 WL 82685 at *3-*5 (Feb. 27, 1995).

evidence linked the weapon to any of the defendant's earlier drug transactions." Br. in Opp. 15. But the exact same things could be said of Roland Bailey's firearm: there was no evidence of actual drug trafficking -- as opposed to the offense for which Bailey was convicted, *possession* with *intent* to distribute -- at the firearm's location (Bailey's car), or anywhere else for that matter, and certainly no evidence linked the weapon to earlier drug transactions, because no such transactions were proven. Moreover, the Sixth Circuit reversed Clemis's conviction even though "currency used in a prior controlled drug purchase was found in the house" where the firearm was discovered, 11 F.3d at 602, whereas the D.C. Circuit has made it clear that proximity to and accessibility from the place where drug proceeds are stored is enough.[5]

The Solicitor General's claim that the conflict in the circuits "has abated, due, in part, to the decision of the court below" (Br. in Opp. 11) is a mere makeweight argument. As Justices White and Thomas pointed out two and a half years ago,[6] the principal -- though not the only -- conflict is between the Second Circuit's *Feliz-Cordero* line of cases and the decisions of other

---

[5]See Pet. App. 11a ("Whenever there is sufficient evidence for a jury to find that the defendant at some time during the commission of the predicate drug offense put or kept a firearm in a place where it would be proximate to and accessible from a place that is clearly connected to his drug trafficking (*e.g.*, **a place used to * * * keep the proceeds of drug transactions**), the jury may also infer that the gun was being used to protect the drug trafficking operation, and was therefore being used in violation of § 924(c)(1).") (emphasis added).

[6]*Langston* v. *United States*, 113 S. Ct. 361, 362 (1992) (dissent from denial of certiorari).

courts that take a very broad approach (a camp into which the D.C. Circuit now falls, by a closely divided vote). A D.C. Circuit decision cannot make a conflict with the Second Circuit "abate," nor -- as decisions like *Melendez* show -- has the Second Circuit retreated from its turf. Moreover, as we demonstrated in the petition, the D.C. Circuit's proximity-and-accessibility test now places that court in conflict with *many* other circuits, because *no* other court has boiled Section 924(c) down to those two factors, to the exclusion of all others, and *several* courts have reversed convictions that the D.C. Circuit's simple test would uphold.[7]

The denial of certiorari in 1992 in *Langston*, despite a conflict in the circuits, may have been attributable to the fact-intensive nature of most Section 924(c) cases and the difficulty for this Court of framing rules of general applicability in resolving fact-bound cases. Now, however, the judges of the D.C. Circuit -- both majority and dissenting -- have formulated general rules to govern the run of Section 924(c) cases, thereby framing the issues in a way that makes them suitable candidates for resolution by this Court.[8] This case presents the best vehicle the

---

[7]Some courts, however, have simply given up on the exercise of distinguishing "use" from mere possession. See Pet. 8 n.4, 9 n.5; Pet. App. 19a n.3.

[8]The Solicitor General's defense of the merits of the decision below (Br. in Opp. 17-20) relies on not a single *fact* of either Bailey's or Robinson's case, but is instead, in its entirety, a discussion of the *legal boundaries* of "use" of a firearm. Thus, the text of the Solicitor General's own brief in opposition belies his attempt on the Question Presented page (Br. in Opp. I) to depict this as a mere sufficiency case. As the D.C. Circuit majority itself put it, "[i]n form the dispute between the parties is little more than a disagreement over the evidence necessary to

Court is ever likely to have for resolution of the recurring circuit conflicts that plague Section 924(c) cases, which are a staple of the diet of the federal courts of appeals. And, as we have shown in the petition and in this reply brief, and contrary to the government's assertion, those conflicts show absolutely no sign of abating.

2. The Solicitor General defends the decision below on the merits (Br. in Opp. 17-20) but in so doing inadvertently proves that the decision below *cannot* possibly be correct. The Solicitor General concedes that "Section 924(c) requires actual (not future) commission of the predicate crime *and actual (not future) use*" of the firearm. Br. in Opp. 20 (emphasis added). Yet the entire thrust of the opinion below is that *actual possession* for *future* use will suffice.

For example, the D.C. Circuit majority insisted that "a gun placed in a drawer beside one's bed for fear of an intruder would, in common parlance, be a gun 'used' for domestic protection." Pet. App. 9a. The majority held that Section 924(c) is violated "whenever one puts or keeps the gun in a particular place from which one * * * can gain access to it *if and when needed to facilitate a drug crime*." Pet. App. 10a (emphasis added). And -- in perhaps its most obvious invocation of future as opposed to present, actual use -- the majority declared that "the gun need only 'ha[ve] *the potential* of facilitating' the drug trafficking offense." Pet. App. 11a

---

sustain a § 924(c) conviction * * * [but in substance] this case is about what constitutes use, as opposed to mere possession, of a firearm." Pet. App. 5a.

(quoting *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993)). If one is going to attempt to distinguish actual from future use -- as the Solicitor General concedes Section 924(c) does -- then these forward-looking scenarios surely must all constitute mere future use. Yet all of them are swept within the D.C. Circuit's broad proximity-and-accessibility test, a test that virtually abandons all pretense of distinguishing actual from future use.

In an effort to escape from this embarrassment, the Solicitor General drops a footnote in which he asserts that a firearm avowedly purchased to protect drug operations "would not" be the subject of a Section 924(c) prosecution if the owner was "presently storing the firearm at a remote and inaccessible location." Br. in Opp. 20 n.4. If the Solicitor General means to suggest that a Section 924(c) conviction would be reversed based on his hypothetical facts, it is not at all clear that the D.C. Circuit agrees.[9] But, more fundamentally, the line the Solicitor General would draw between accessible and inaccessible guns is not the line drawn by the statute, which distinguishes "use" from mere possession. As Judge Williams (joined by Judges Silberman and Buckley) pointed out in

---

[9]See Pet. App. 10a ("we *hold* that one uses a gun, i.e. avails oneself of a gun, and therefore violates the statute, whenever one puts or keeps the gun in a particular place from which one * * * can gain access to it if and when needed to facilitate a drug crime") (emphasis added). Presumably, the reference in the Solicitor General's footnote to "presently storing" the gun in a remote location does not mean storing it where even its owner *cannot* access it; otherwise, the Solicitor General's hypothetical example simply describes a species of irrational conduct that does not exist in the real world.

dissent, the majority below "has in effect diluted 'use' to mean simply possession with a floating intent to use." Pet. App. 16a.

As Judge Williams' dissent persuasively demonstrates, and for additional reasons discussed in *United States* v. *McFadden*, 13 F.3d 463, 466-469 (1st Cir. 1994) (Breyer, C.J., dissenting), and in the petition, "use" in Section 924(c) should be construed to mean *active* use and not mere non-accidental possession nearby drugs. Congress did not write Section 924(c) to reach possession, even purposeful possession, and it is not the function of the courts to rewrite Section 924(c) to that end.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROY T. ENGLERT, JR.,
Counsel of Record
Mayer, Brown & Platt
2000 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Petitioner

MARCH 1995

---

*James G. Duncan, who was previously counsel of record in this matter, is now employed by the United States Department of Justice. The Court is requested to substitute Roy T. Englert, Jr., as counsel of record.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-7448

ROLAND J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

CERTIFICATE OF SERVICE

I, Roy T. Englert, Jr., counsel for Roland J. Bailey and a member of the Bar of this Court, hereby certify that on this 7th day of March, 1995, three copies of the Reply Brief for the Petitioner in the above-captioned case were served by first-class mail, postage prepaid, on the following counsel for respondent United States of America:

The Honorable Drew S. Days, III
Solicitor General
Department of Justice
Washington, D.C. 20530

and on the following counsel for Candisha S. Robinson, petitioner in No. 94-7492:

David B. Smith
English & Smith
526 King Street
Suite 213
Alexandria, VA 22314

I further certify that all parties required to be served have been served.

Roy T. Englert, Jr.
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1882
(202) 778-0657

MAYER, BROWN & PLATT

CHICAGO
LONDON
NEW YORK
HOUSTON
LOS ANGELES
TOKYO
BRUSSELS

2000 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006-1882

202-463-2000
TELEX 892603
FACSIMILE:
202-861-0473

ROY T. ENGLERT, JR.
202-778-0657

March 7, 1995

RECEIVED
HAND DELIVERED
MAR - 7 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

VIA MESSENGER

Francis J. Lorson, Esq.
Chief Deputy Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Roland J. Bailey v. United States, No. 94-7448

Dear Mr. Lorson:

Enclosed for filing are twelve typescript copies of the Reply Brief For The Petitioner in the above-captioned case. Also enclosed is an extra copy to be date-stamped and returned to our messenger.

Because the petition and brief in opposition in this case either have been distributed or are being distributed to the Justices' chambers today, I request that you distribute the reply briefs to the Justices' chambers as soon as possible.

Thank you for your consideration in this matter.

Sincerely,

Roy T. Englert, Jr.

Roy T. Englert, Jr.

Enclosures